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MUHAMMAD NOOR REDZUAN MISRAN v. MUHAMMAD AMIRUL HAFIZ KHAIRULAZUIN

HIGH COURT MALAYA, JOHOR BAHRU
AWANG ARMADAJAYA AWANG MAHMUD JC
[APPEAL NO: JA-12B-18-05-2019]
B 27 FEBRUARY 2020

ROAD TRAFFIC: *Accident – Liability – Apportionment of liability at 80% on appellant and 20% on respondent – Appellant rode motorcycle without driving license – Whether prohibited from driving motor vehicle – Whether riding*
C *motorcycle without driving license was illegal act – Whether posed danger to himself and other road users – Whether appellant could be protected under law – Whether appellant was 100% liable – Road Transport Act 1987, ss. 26(1), 90 & 95*

D The appellant was riding a motorcycle, with the registration number JMT7056, along the EDL Highway, while the respondent was riding on another motorcycle, JRP8874, on the same highway when he collided with the appellant who stopped to make a phone call. The respondent, who was about 40m away from the appellant when he realised that the appellant was in front of him, could not stop in time. As a result, the appellant was thrown
E off his motorcycle, but did not pass out notwithstanding the impact of the accident. The evidence showed that the road was clear of any traffic, the lighting was not poor and the road conditions were good and it was dry at the material time. The investigating officer found that the appellant was without a valid driving license or road tax or covering insurance when he
F rode the motorcycle. The Sessions Court Judge ('SCJ') apportioned the liability to 80% on the appellant and 20% on the respondent. Hence, this appeal. The issue for determination by the court in this appeal was whether a person riding a motorcycle without a valid driving license had the right to be on the road and hence the protection of the law.

G **Held (dismissing appeal with costs):**

(1) The purpose of the Road Transport Act 1987 ('RTA'), *inter alia*, is 'to make provision for regulation of traffic on roads'. Of relevance is s. 26(1) of the RTA which provided, among others, that '… no person shall drive a motor vehicle of any class or description, on a road unless
H he is the holder of a driving license authorising him to drive a motor vehicle of that class or description.' The prohibition is almost complete as it provides that anyone who is without a license is prohibited from driving a motor vehicle. EDL Highway is a public road where the provision of s. 26(1) is applicable. (paras 8, 12, 13 & 14)

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(2) The maxim that is of particular importance is *ex turpi causa non oritur actio,* a legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act (*Holman v. Johnson*). The court also should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account: (i) the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim; (ii) any other relevant public policy on which the denial of the claim may have an impact; and (iii) whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. (paras 16, 17 & 33)

(3) The appellant was without any driving license. A person who is a danger to both himself or anyone else for lack of a valid driving license to drive or ride on a road should not be on the road. It is a public policy as reflected by the intentions of the Parliament in ss. 26 and 90 of the Road Transport Act 1987. In the case where a driver was not covered by the insurance policy by virtue of the fact that he had no driving license and hence, should not be on the road, that conduct of driving a motor vehicle without a valid license was itself an illegal act. (paras 34, 40 & 45)

(4) By the operation of s. 90 of the RTA, a person must have a valid insurance policy to cover himself while he is driving or riding a motor vehicle on a road. The restriction for the coverage of a valid insurance under s. 95 of the RTA is, among others, '(j) the driver of the motor vehicle at the time of the accident not holding a license to drive or not holding a license to drive the particular motor vehicle.' The danger of an unlicensed driver or rider on a road driving or riding a motor vehicle is that anyone who has an accident with the unlicensed person is not covered by any insurance policy, even if the other person is licensed. This does not deprive the 'other person' who is properly licensed and insured to be properly and fully covered by his own insurance policy, if he has one. (paras 34, 37, 38 & 39)

(5) Essentially, good faith on both sides is the bedrock of insurance policy coverage. The insurer must fulfil his pledge and the insured must obey all the requirements of law and policy. Taking it into the realm of vehicle insurance, the insured must comply with both s. 26 and ss. 90/95 of the Road Transport Act 1987. The law cannot protect one who has no regard of the law. If the appellant was not on the road because he was unlicensed or without road tax, there would not be any vehicle for the respondent to knock into. (paras 47, 50 & 52)

(6) To allow the appeal would tantamount to rewarding the appellant for not complying with the law, or worse, to reward him for the violation of the very law that seeks to regulate the conduct of traffic and transportation on the road, by posing a danger both to himself and above all, to other law abiding users of the road. In the exercise of the inherent jurisdiction of this court pursuant to O. 1A and O. 92 r. 4 of the Rules of Court 2012, the liability was held to be on the appellant 100%. In the absence of any error for judicial intervention in respect of the quantum, the quantum as decided by the SCJ was affirmed. (paras 50, 56 & 57)

Case(s) referred to:

Ashton v. Turner [1981] QB 137 ***(refd)***
Britton v. Royal Insurance Company (1865) 176 ER 843 ***(refd)***
Chu Kim Sing & Anor v. Abd Razak Amin [1999] 4 CLJ 448 HC ***(dist)***
Colburn v. Patmore (1834) 1 Crop M & R 73 ***(refd)***
Galloway v. Guardian Royal Exchange (UK) Limited [1997] EWCA Civ 2487 ***(refd)***
Gray v. Thames Trains Ltd [2009] UKHL 33 ***(refd)***
Hardy v. Motor Insurance Bureau [1964] 2 QB 745 ***(refd)***
Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***
Joyce v. O'Brien [2013] WLR (D) 182 ***(refd)***
Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(dist)***
McCracken v. Smith & Ors [2015] EWCA Civ 380 ***(refd)***
National Coal Board v. England [1954] AC 403 ***(refd)***
New Zealand Insurance Co Ltd v. Sinnadorai [1969] 1 LNS 119 FC ***(refd)***
Patel v. Mirza [2016] UKSC 42 ***(refd)***
Pitts v. Hunt [1990] 3 All ER 344 ***(refd)***
Porter v. Zurich Insurance Company [2009] 2 All ER (Comm) 658 ***(refd)***
Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor [2001] 1 CLJ 498 HC ***(refd)***
Smith v. Jenkins (1970) 119 CLR 397 ***(refd)***
Tinsley v. Milligan [1992] Ch 310 ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 17A
Road Transport Act 1987, ss. 26(1), 90(1), 95, 96(3)
Rules of Court 2012, O. 1A, O. 92 r. 4

Criminal Justice Act 1993 [UK], s. 52
Road Traffic Act 1972 [UK], s. 148(3)

For the appellant - Teo Han Ley; M/s Teo & Assocs
For the respondent - Noor Fauziah Kadir; M/s S K Lee

Reported by S Barathi

JUDGMENT

Awang Armadajaya Awang Mahmud JC:

Introduction

[1] This is an appeal against the decision of the learned Sessions Court Judge delivered on 30 April 2019 whereby the learned Sessions Court Judge found that the appellant/plaintiff was 80% liable while the respondent/defendant was 20% liable for a road traffic accident that happened on 26 September 2016 at about 1.15am along the EDL Highway. The total quantum (100%) awarded was RM154,425.

The Facts Of The Case

[2] The appellant/plaintiff was riding a motorcycle (registration number JMT7056) along the EDL Highway at 1.15am. The respondent/defendant was riding on another motorcycle JRP8874 on the same highway at the same time when he collided with the appellant who stopped to make a phone call. The respondent/defendant was about 40m from behind the appellant/plaintiff when he realised that the appellant/plaintiff was in front of him. The respondent/defendant could not stop in time. As a result of the accident, the appellant/plaintiff was thrown off his motorcycle but he did not passed out notwithstanding the impact of the accident.

[3] The road was clear of any traffic, the lighting was not poor and the road conditions were good and it was dry at the material time.

[4] The investigating officer, Insp Nurul Najwa binti Abdullah found that the appellant/plaintiff was without a valid driving license or road tax or covering insurance when he rode the motorcycle (encl. 4, p. 80, line 26 to 32)

The Issue In This Appeal

[5] Notwithstanding the other issues that the appellant/plaintiff brought before this court, there is one determining factor.

Whether A Person Riding A Motorcycle Without A Valid Driving/Riding License Has The Right To Be On The Road And Hence The Protection Of The Law?

[6] This court has invited both parties to submit on this point when this appeal was heard on 19 January 2020. Both parties were then instructed to file written submissions before or on 3 February 2020 and to simultaneously exchange the same on the day itself, and submissions in reply, if any, to be filed before or on 7 February 2020.

[7] The long title of the Road Transport Act 1987 ("the Act") is:

> An Act to make provision for the regulation of motor vehicles and of traffic on roads and other matters with respect to roads and vehicles thereon; to make provision for the protection of third parties against risks arising out of the use of motor vehicles; to make provision for the co-ordination and control of means of and facilities for transport; to make provision for the co-ordination and control of means of and facilities for construction and adaptation of motor vehicles; and to make provision for connected purposes.

[8] The purpose of the Act may be enumerated as follows:

(i) To make provision for the regulation of motor vehicles;

(ii) to make provision for regulation of traffic on roads;

(iii) other matters with respect to roads and vehicles thereon;

(iv) to make provision for the protection of third parties against risks arising out of the use of motor vehicles;

(v) to make provision for the coordination and control of means of and facilities for transport;

(vi) to make provision for the coordination and control of means of and facilities for construction and adaptation of motor vehicles; and

(vii) to make provision for connected purposes.

[9] It is clear that the second purpose of the Act is "to make provision for regulation of traffic on roads".

[10] Among the many provisions, I shall bring forth the relevant ones.

[11] Section 26 of the Act states as follows:

> **26 Driving licences**
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> **(1) Except as otherwise provided in this Act, no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description,** and no person shall employ or permit another person to drive a motor vehicle on the road unless the person so employed or permitted to drive is the holder of such a driving licence.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall on conviction be liable to a fine of not less than three hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

(3) For the purposes of this section, the expression "holder of a driving licence" includes a person in possession of and driving a motor vehicle in accordance with a licence duly issued by or on behalf of the proper authority authorising such person in the course of his duties as a member of the Forces to drive a motor vehicle of the class or description specified in such licence and being a vehicle which is the property of the Government or of any Government whose forces are lawfully in Malaysia under the provisions of any law for the time being in force regulating visiting forces lawfully present in Malaysia. (emphasis added)

[12] It is important to note that the wordings of the section is "(1) Except as otherwise provided in this Act, **no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence** authorising him to drive a motor vehicle of that class or description ...," (emphasis added)

[13] The prohibition is almost complete because no one is allowed to drive a motor vehicle on the road unless he has a valid licence. Anyone who has no license should not be driving a motor vehicle.

[14] There is no doubt that EDL Highway is a public road where the provision of s. 26(1) of the Act is applicable.

[15] In *Siti Rohani Mohd Shah & Ors v. Hj Zainal Hj Saifiee & Anor* [2001] 1 CLJ 498, where the first appellant was the rider of a motorcycle who was 11 years old when the accident occurred and therefore without a valid driving license. The first appellant collided with a lorry driven by the second respondent at a sharp bend of the road. The trial judge took the view that the second respondent gave the true version of the collision and gave judgment for the second respondent. The appellants appealed. His Lordship Jeffrey Tan J opined that riding or driving without a valid license *per se* is not negligent. The law does not sanction a person without a valid license to be riding or driving a vehicle on the road, but that person is not fair game with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road. The only remedy or penalty is that which is prescribed in the Road Transport Act 1987. The remedy is not an actionable wrong.

[16] In law, the maxim that is of particular importance is *ex turpi causa non oritur actio*, a legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act. In the law of tort, *ex turpi causa* is also known as the illegality defence, since a defendant may plead that even though, for instance, he broke a contract, conducted himself negligently or broke an equitable duty, nevertheless, a claimant by reason of his own illegality cannot sue.

[17] In *Holman v. Johnson* (1775) 1 Cowp 341 the Lord Chief Justice, Lord Mansfield set out the rationale for the illegality doctrine:

> The objection, that a contract is immoral or illegal as between Plaintiff and Defendant, sounds at all times very ill in the mouth of the Defendant. It is not for his sake, however, that the objection is ever allowed; *but it is founded in general principles of policy, which the Defendant has the advantage of, contrary to the real justice, as between him and the Plaintiff, by accident, if I may say so.* The principle of public policy is this; *ex dolo malo non oritur actio* ("no action arises from *deceit*"). *No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.* If, from the Plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ("from an immoral cause"), or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the Defendant, but because they will not lend their aid to such a Plaintiff. So if the Plaintiff and Defendant were to change sides, and the Defendant was to bring his action against the Plaintiff, the latter would then have the advantage of it; for where both were equally in fault, *potior est conditio defendentis* ("stronger is the position of the Defendant"). (emphasis added)

[18] Almost two centuries ago Lord Lyndhurst CB held in the case of *Colburn v. Patmore* (1834) 1 Crop M & R 73, at p. 83:

> I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give opinion on the point; but I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission.

[19] In *Smith v. Jenkins* (1970) 119 CLR 397. A passenger was injured by the driver of a stolen car which he and the driver had stolen as part of a joint enterprise. The High Court was unanimous in concluding that the plaintiff could not recover. Justice Windeyer, giving a judgment which was approved by a majority of the other judges of the court, formulated the relevant principle as follows:

> If two or more persons participate in the commission of a crime, each takes the risk of the negligence of the other or others in the actual performance of the criminal act. That formulation can be regarded as founded on the negation of duty, or on some extension of the rule *volenti non fit injuria*, or simply on the refusal of the courts to aid wrongdoers. How it be analysed and explained matters not.

[20] In *National Coal Board v. England* [1954] AC 403, Lord Asquith said:

> If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A.

[21] In *Ashton v. Turner* [1981] QB 137, the defendant injured the plaintiff by crashing the car they sat in together in the course of fleeing the scene of a burglary they had committed together. Justice Ewbank held that the court may not recognise a duty of care in such cases as a matter of public policy.

[22] Similarly, in *Pitts v. Hunt* [1990] 3 All ER 344, the Court of Appeal rationalised this approach, saying that it was impossible to decide the appropriate standard of care in cases where the parties were involved in illegality.

[23] The claimant, Mr Pitts (aged 18), and Mr Hunt (aged 16), were friends. They had been out for an evening together. Mr Hunt gave the claimant a lift on the back of his trials motorbike which was a Suzuki 250cc. He had no license to ride the bike on the road, indeed, the engine capacity limit for a 16 years old to ride legally would be 50cc. He also had no tax or insurance. The pair consumed alcohol at their destination and Mr Hunt was twice over the legal limit for driving. Nevertheless, the pair embarked on their journey home on the motorcycle. Witnesses gave evidence that the two were obviously very drunk and Mr Hunt was driving recklessly and erratically. He was zig-zagging down the centre of an A road at great speed, with both the parties shouting and jeering. Mr Pitts was jeering Mr Hunt on and encouraging the dangerous driving. At one time, Mr Hunt drove dangerously close to a witness in order to scare them. Unfortunately, Mr Hunt hit an oncoming car when he was travelling at speed on the wrong side of the road. Mr Hunt was killed and the claimant was left permanently partially disabled. He brought an action for the injuries sustained against the personal representatives of Mr Hunt. In their defence, they raised the defences of *volenti non fit injuria*, contributory negligence and *ex turpi causa*. The trial judge held that the claimant could not recover based on the fact that *ex turpi causa* operated to preclude the imposition of a duty of care and also that the claimant was 100% responsible for his own injuries under the Law Reform (Contributory Negligence) Act 1945. On the issue of *volenti,* he held that s. 148(3) of the Road Traffic Act 1972 precluded the application of the defence. The claimant appealed. The Court of Appeal, UK held that, *inter alia*:

> *Ex turpi causa and public policy did operate to preclude the imposition of a duty of care. The trial judge was wrong in principle in finding that the Claimant was 100% contributory negligence since the wording of the Act precluded such a finding. S.148(3) of the Road Traffic Act did preclude the application of the defence of volenti non fit injuria.* (emphasis added)

[24] In *Gray v. Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1319, Lord Hoffmann, with whose speech Lords Phillips, Scott and Rodger agreed, described the *ex turpi* concept in the following terms (para. 30):

A The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore that policy is not based upon a single justification but on a group of reasons, which vary in different situations.

[25] In *McCracken v. Smith & Ors* [2015] EWCA CIV 380, the Court of Appeal considered the maxim *ex turpi causa*.

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[26] The claimant was injured when the trials bike on which he was a pillion passenger collided with a minibus. The bike had been stolen (although it was not proven at trial that the claimant knew that) and was not allowed on normal roads. The rider of the bike was uninsured and did not have a license and the bike was being ridden at dangerous speeds on a cycle path. C At first instance, the judge rejected the Motor Insurer's Bureau's ("MIB") defence of *ex turpi causa* (ie the principle that no action can arise from the claimant's own illegal act). However, the MIB was not liable because the claimant knew the bike was being used without insurance. The driver of the minibus was found to have been negligent and he challenged the finding that D *ex turpi causa* did not succeed here.

[27] The Court of Appeal has now held that although the rider of the bike (and hence the MIB too) could rely on a defence of *ex turpi causa*, the driver of the minibus could not.

E **[28]** Reference was made to the earlier Court of Appeal decision in *Joyce v. O'Brien* [2013] WLR (D) 182. There, the Court of Appeal held the defence could not apply where a claimant was engaged in a joint criminal enterprise such that it was foreseeable that the enterprise would be subject to unusual or increased risks of harm – if the risk materialised, the injury would have been caused by the criminal act (even if it results from the negligence of a F third party). In this case, the Court of Appeal found that that test was satisfied as against the bike rider. There had been a joint enterprise between the claimant and the bike rider to ride the bike dangerously and such conduct amounted to turpitude. The Court of Appeal left open the question, though, of what constitutes a "minor traffic offence" (Elias LJ having said in *Joyce* G *v. O'Brien* (*supra*) that the *ex turpi causa* defence did not apply to such offences).

[29] However, the accident had had two causes: the claimant's own criminal conduct and the minibus driver's negligence: "I do not think that the fact that the criminal conduct was one of the two causes is a sufficient H basis for the *ex turpi causa* defence to succeed ... for reasons I have explained, cases involving a claim by one party to a criminal joint enterprise against another party to that joint enterprise are materially different. In my judgment, the right approach is to give effect to both causes by allowing (the

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claimant) to claim in negligence against (the minibus driver) but, if negligence is established, by reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect (the claimant)'s own fault and responsibility for the accident".

[30] In 2016, the UK Supreme Court provided a major reconsideration of this doctrine, in *Patel v. Mirza* [2016] UKSC 42 overruling the test in *Tinsley v. Milligan* [1992] Ch 310 and replacing it with a new set of principles. The changes were described as 'revolutionary' by a judge on the case.

[31] *Patel v. Mirza* [2016] UKSC 42 is an English contract law case concerning the scope of the illegality principle relating to insider trading under s. 52 of the Criminal Justice Act 1993.

[32] Mr Patel paid £620,000 to Mr Mirza pursuant to an agreement under which Mr Mirza would bet on the price of some shares, on the basis of insider information. Using advance insider information to profit from trading in securities is an offence under s. 52 of the Criminal Justice Act 1993. The scheme did not come to fruition as the expected insider information was mistaken. Thereafter, Mr Patel brought a claim based on contract and unjust enrichment for the return of £620,000. Mr Mirza argued that no such obligation could be enforced because the whole contract was illegal, and any claim would be precluded by the principle of *ex turpi causa non oritur actio.*

[33] The UK Supreme Court held unanimously that Mr Patel could recover the money, and that the formal test in *Tinsley v. Milligan* [1992] Ch 310 was no longer representative of the law.

[34] A person who satisfies the ordinary requirements for a claim in unjust enrichment should be entitled to the return of his property; he should not *prima facie* be debarred from recovering his property just because the consideration which had failed was an unlawful consideration. Mr Patel's claim should be allowed since it would have the effect of returning the parties to their positions prior to the conclusion of the illegal contract, as well as prevent Mr Mirza from being unjustly enriched.

[35] Lord Toulson considered the state of the law concerning illegality:

> Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand.

[36] Thus, the prior test in *Tinsley v. Milligan* (*supra*) is inconsistent with the coherence and integrity of the legal system.

[37] Instead, the court should consider whether the public interest would be harmed by the enforcement of the illegal agreement, taking into account:

(i) the purpose of the prohibition which has been transgressed, and whether the purpose would be enhanced by the denial of the claim;

(ii) any other relevant public policy on which the denial of the claim may have an impact; and

(iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

[38] Coming back to our instant appeal, it is evident that the appellant/plaintiff was without any driving license at all. By the operation of s. 90 of the Road Transport Act 1987, a person must have a valid insurance policy to cover him while he is driving or riding a motor vehicle on a road. I reproduce the provision for ease of reference:

> 90 Motor vehicle users to be insured against third party risks
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> (1) Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.
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> (2) If a person acts in contravention of this section he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence under Part II for a period of twelve months from the date of the conviction.
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> (3) A person disqualified by virtue of a conviction under this section or of an order made there under from holding or obtaining a driving licence shall, for the purposes of Part II, be deemed to be disqualified by virtue of a conviction under the provisions of that Part:
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> Provided that a person shall not be convicted of an offence against this section if he proves:
>
> (a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or loan;
>
> (b) that he was using such vehicle in the course of his employment; and

(c) that he neither knew, nor had reason to believe, that there was not in force in relation to such user a policy of insurance or such security as complies with the provisions of this Part.

(4) Notwithstanding any written law prescribing a time within which proceedings may be brought before a court, proceedings for an offence under this section may be brought:

(a) within a period of six months from the date of the commission of the alleged offence; or

(b) within a period which exceeds neither three months from the date on which it came to the knowledge of the prosecutor that the offence had been committed nor one year from the date of the commission of the offence,

whichever period is the longer.

(5) This section shall not apply:

(a) to a vehicle owned by:

(i) any Government in Malaysia;

(ii) the Government of the Republic of Singapore;

(iii) a Municipality or other local authority approved by the Minister charged with the responsibility for local government except to a public service vehicle, other than an employee vehicle; or

(iv) a public body,

whilst the vehicle is being used for the purpose of any such Government, Municipality or other local authority or public body owning the same;

(b) to any motor vehicle at any time when it is being driven for police purposes by or under the direction of a police officer; or on a journey to or from any place undertaken for salvage purposes pursuant to Part X of the Merchant Shipping Ordinance 1952;

(c) to any motor vehicle at any time when it is being driven by or under the direction of a road transport officer for the purpose of examining or testing the mechanism of the motor vehicle or of testing the ability of a person to control or to drive a motor vehicle in connection with an application for a licence to drive a motor vehicle; or

(d) to a motor vehicle in respect of which the registered owner has deposited with the Accountant General the sum of one hundred and twenty-five thousand ringgit at any time when such motor vehicle is being driven by the registered owner or by his servant in the course of his employment, or is otherwise subject to the control of the registered owner.

[39] Section 90(1) of the Act states that "(1) Subject to this Part, *it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks* as complies with the requirements of this Part." (emphasis added)

[40] Who is covered by a valid insurance policy? The answer lies in s. 95 of the Act which reads as follows:

95 Avoidance of restrictions on scope of third party risks policies

Where a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, **so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:**

(a) the age or physical or mental condition of persons driving the motor vehicle;

(b) the condition of the motor vehicle;

(c) the number of persons that the motor vehicle carries;

(d) the weight or physical characteristics of the goods that the motor vehicle carries;

(e) the times at which or the areas within which the motor vehicle is used;

(f) the horse-power or value of the motor vehicle;

(g) the carriage on the motor vehicle of any particular apparatus;

(h) the carriage on the motor vehicle of any particular means of identification other than any means of identification required to be carried under Part II;

(i) the driver of the motor vehicle at the time of the accident being under the influence of intoxicating liquor or of a drug;

(j) **the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle;**

(k) the motor vehicle being used for a purpose other than the purpose stated in the policy,

shall, as respects such liabilities as are required to be covered by a policy under paragraph 91(1)(b) , be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person. (emphasis added)

[41] The restriction for the coverage of a valid insurance (if there is one) is, among others: A

> (j) **the driver of the motor vehicle at the time of the accident not holding a licence to drive or not holding a licence to drive the particular motor vehicle**; (emphasis added)

[42] In the words of s. 95 as "shall, as respects such liabilities as are required to be covered by a policy under para. 91(1)(b), be of no effect: What it means is a person who drives or rides on a motor vehicle on the road, is not insured nor would the insurance policy (if it is still valid) covers him or anyone else **with him**. B

[43] **"With him"** here includes one with whom the unlicensed (and hence uninsured) driver or rider has an accident with. (emphasis added) C

[44] The danger of an unlicensed driver or rider on a road driving or riding a motor vehicle is that anyone who has an accident with the unlicensed person is not covered by any insurance policy even if the other person is licensed. Of course, this does not deprive the "other person" who is properly licensed and insured to be properly and fully covered by his own insurance policy, if he has one. D

[45] As an illustration, A has no valid license to drive a car, but still drives a motor vehicle on the road. He met an accident with B who is a validly licensed person. B cannot make a claim for damages from A's insurance policy because the policy does not cover A or B. A cannot claim for damages from an insurance policy even if that insurance policy is valid and subsisting. B, however, if he has a valid insurance may claim from his own insurance policy. E F

[46] I am of the view that since a person who is a danger to both himself or anyone else on the account of his lack of a valid driving license to drives or ride (as the case maybe) on a road, should not be on the road. It is a public policy as reflected by the intentions of the Parliament in ss. 26 and 90 of the Road Transport Act 1987. G

[47] This court is constrained to s. 17A, Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. H

[48] The Federal Court had the occasion of discussing s. 90 of the Road Transport Act 1987 in the case of *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731 where the appellant ("the plaintiff") was the insurer of a lorry owned by Shakti Velan Enterprise ("the I

second defendant") under an insurance policy. The authorised driver of the lorry ('the first defendant') had reversed the lorry into the respondent ("the third defendant"), while the latter was performing his duty as a lorry attendant, resulting in injuries. The third defendant commenced an action at the Sessions Court, premised on the tort of negligence, against the first and second defendants. The plaintiff filed originating summons ("OS") at the High Court, pursuant to s. 96(3) of the Road Transport Act 1987 ("RTA"), seeking a declaration that the scope of its insurance policy did not cover the accident. In support of its OS, the plaintiff submitted that since the third defendant was the second defendant's employee, he fell within the exception provided by the law where the plaintiff was entitled to avoid liability, under the insurance policy, and had no obligation to pay the claim.

[49] The Federal Court ruled that, *inter alia*:

> The exceptions in the insurance policy must be read subject to the RTA because the statute expressly requires that all users of motor vehicles be insured against third party risks. The exception which fell for consideration in this case was s. 91(1)(aa) of the RTA. Therefore, the present case was concerned only with exception (ii) of the insurance policy which corresponded with s. 91(1)(aa) of the RTA. It was not disputed that the third defendant was an employee of the second defendant. The case put at the High Court and the Court of Appeal was not that the third defendant was traveling in the vehicle as a passenger by reason of or in pursuance of a contract of employment. Consequently, exception (iii) and s. 91(1)(bb) of the RTA were not relevant to the facts of this case.

[50] In *Malaysian Motor Insurance Pool* (*supra*), the discussion was whether there were two separate contracts on one policy. It is to be noted that the first defendant was an authorised driver meaning that he is licensed to drive the said lorry. The issue of a non-licensed driver does not arise because all parties were in proper compliance of the law in so far as driving licence is concerned.

[51] The Court of Appeal in England and Wales discussed this issue of illegality that is perpetuated in insurance claim in the case of *Galloway v. Guardian Royal Exchange (UK) Limited* [1997] EWCA Civ 2487 where the claimant's policy had been declared *void ab initio* by the court. On the application form he had falsely stated that he had no convictions, but had only shortly before been convicted of obtaining a pecuniary advantage by deception. Part of the claim had also been found to be dishonest, and had been convicted of an offence for that. It was held "That fraudulent part contaminated the whole claim. The contract of insurance being one of utmost good faith, the assured could not first make a fraudulent claim, then seek to leave that part and pursue the rest. He will forfeit all benefit under the policy whether there is a condition to that effect or not. The appeal failed."

[52] In *Porter v. Zurich Insurance Company* [2009] 2 All ER (Comm) 658 where the claimant insured his house with the defendants. Severely depressed, drunk and delusional, he set fire to it and now claimed after refusal to pay out. He said that he was not acting as a free agent.

[53] It was held that:

> A claimant who seeks to recover pursuant to a policy of insurance in respect of a fire which he himself started is faced with the difficulty that his claim is contrary to public policy and/or contrary to general principles of insurance laws. He had to show that he did not know 'the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong.' He failed to establish that to the required level.

[54] Lord Diplock in *Hardy v. Motor Insurance Bureau* [1964] 2 QB 745 particularly at pp. 767 to 768 and I quote:

> The rule of law on which the major premise is based, *ex turpi causa non oritur actio*, is concerned not specifically with the lawfulness of contracts *but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently anti-social to justify the court's refusing enforce that right.*

[55] In a case where a driver is not covered by an insurance policy by virtue of the fact that he has no driving license and hence, should not be on the road, that conduct of driving a motor vehicle without a valid license is itself an illegal act.

[56] In *Britton v. Royal Insurance Company* (1865) 176 ER 843, the insured made a claim under his insurance policy for twice the amount he had actually lost. It was an express condition of the insurance policy that a fraudulent part of a claim would avoid the balance of the claim. Justice Willes held that "A fire insurance, he said, is a contract of indemnity; that is, it is a contract to indemnify the assured against the consequences of a fire, provided it is not wilful. Of course, if the assured set fire to his house, he could not recover. That is clear. But it is not less clear that, even supposing it were not wilful, yet as it is a contract of indemnity only, that is, a contract to recoup the insured the value of the property destroyed by fire, if the claim is fraudulent, it is defeated altogether. That is, suppose the insured made a claim for twice the amount insured and lost, thus seeking to put the office off its guard, and in the result to recover more than he is entitled to, that would be a wilful fraud, and the consequence is that he could not recover anything. This is a defence quite different from that of wilful arson. It gives the go-bye to the

origin of the fire, and it amounts to this – that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice, and also with sound policy. *The law is, that a person who had made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained.* It is the common practice to insert in fire-policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accordance with legal principle and sound policy. It would be most dangerous to permit parties to practise such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy." (emphasis added)

[57] Essentially, good faith on both sides is the bedrock of insurance policy coverage. The insurer must fulfil his pledge (that is sealed in a contract) and the insured must obey all requirements of law and policy.

[58] Taking it into the realm of vehicle insurance, the insured must comply with both s. 26 and ss. 90/95 of the Road Transport Act 1987.

[59] The Federal Court in the case of *New Zealand Insurance Co Ltd v. Sinnadorai* [1969] 1 LNS 119; [1969] 1 MLJ 183 in particular the judgment of Ong Hock Thye CJ (as he then was) at p. 184 to 185 (MLJ) opined:

> As section 80(1) refers specifically to "judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy)" the provisions of such section necessarily assume first importance as a touchstone. The relevant portions of section 75 read as follows:
>
> ...
>
> *In plain language this means that insurance cover is compulsory in respect of (a) all third parties other than passengers carried in the insured's vehicle and (b) passengers carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance. Up to this point there is no difference of opinion between counsel on both sides. The real conflict is on the interpretation of the bracketed words in section 80(1), "being a liability covered by the terms of the policy". Is such liability to be construed as synonymous and exegetical of "such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75*"?
>
> (emphasis added)

[60] Hence, as Lord Toulson has it "*Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand*." (emphasis added)

[61] To allow this appeal would tantamount to rewarding the appellant/plaintiff for not complying with the law, or worse to reward him for the violation of the very law that seeks to regulate the conduct of traffic and transportation on the road, by posing a danger both to himself and above all, to other law-abiding users of the road. I find this position untenable and totally unacceptable.

[62] In short, the law cannot protect one who has no regard of the law.

[63] I am aware of the judgment of Abdul Malik Ishak J in *Chu Kim Sing & Anor v. Abd Razak Amin* [1999] 4 CLJ 448 where His Lordship opined that:

> In my judgment, the fact that the respondent did not have a valid driving licence, and was not wearing a safety helmet and the fact that the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn cannot in law make him negligent. There was no duty on the part of the respondent to minimise the effects or probable consequences of any injury that he may suffer, but which he has yet to suffer, through the negligence of another. It was not foreseeable for the respondent to foresee that harm would fall on others as to make him liable for actionable negligence by riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle with these extraneous factors being contravened by him would result in harm to himself and thereby contribute to the cause of the accident. (emphasis added)

[64] I have no reason to disagree with His Lordship. But the issue at hand is that not the conduct of the appellant on the road. If he is shown to be careful, the issue of negligence may not arise.

[65] The issue is more of the fact that, if he is not on the road because he is unlicensed or without road tax, would there be any vehicle in front of the respondent to knock into? Surely not!

[66] This is a court of law that decides on human conduct based on tangible evidence before us. This court does not indulge in theological debates that if it is not the appellant, perhaps someone else will. That is for the ecclesiastical courts to discuss on the theological possibilities of the world.

A

Conclusion

[67] I am aware that this judgment may be criticised as being very harsh but it is difficult to make society understand that they stand to lose if they allow unlicensed drivers on the road, causing injuries or hardship on others. But this is the lesser of the two evils.

B

[68] In considering this point, I am of the view, if I am to choose between two beneficial matters, then I choose the greater of the two.

[69] If I am to choose between two evils, then it is the lesser of the two.

C

[70] If there is a choice between a benefit and an evil, one is duty-bound to eradicate the evil before picking the benefit.

[71] For the reasons aforesaid, I dismissed this appeal with costs. In exercise of the inherent jurisdiction of this court pursuant to O. 1A and O. 92 r. 4 of the Rules of Court 2012, I ruled that the liability is on the

D

appellant/plaintiff 100%.

[72] I have perused over the appeal records, the grounds of judgment of the learned Sessions Court Judge as well as the written submissions of parties as well as heard the oral submissions. I find that there is no error that would invite judicial intervention in respect of the quantum as decided by the

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learned Sessions Court Judge. I affirm the quantum as decided by the learned Sessions Court Judge.

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